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No. 77-54

# In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH D. BEASLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App.. A) is reported at 550 F. 2d 261. The oral opinion of the district court (Pet. App. D) is unreported.

## JURISDICTION

The judgments of the court of appeals (Pet. Apps. B, C) were entered on April 8, 1977, and a petition for rehearing was denied on May 10, 1977 (553 F. 2d 100). On June 3, 1977, Mr. Justice Powell extended the time for filing the petition for a writ of certiorari to July 9, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's motion for a new trial based on allegedly newly discovered evidence or alleged prosecutorial misconduct.

2. Whether the government abused the grand jury process by recalling a witness before the grand jury, after petitioner had been indicted, for the purpose of allowing the witness to recant his prior perjurious testimony.

3. Whether, in the circumstances of this case, petitioner was denied a fair trial by the government's refusal to grant immunity to witnesses whom petitioner believed might testify in his behalf at a post-trial hearing.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and two counts of causing claims to be presented to the United States, knowing them to be false, fictitious and fraudulent, in violation of 18 U.S.C. 287 and 2.[1] He was sentenced to concurrent terms of two years' imprisonment on each count. Following his conviction, petitioner moved for a new trial based on allegedly newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. D). The court of appeals affirmed (Pet. App. A).

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[1]This was petitioner's second trial. His first trial resulted in a mistrial when the jury failed to reach a verdict. At the first trial, petitioner was tried jointly with his co-defendant, Oscar Kramer, although they were retried separately (Pet. App. 4a). Kramer was also convicted on all three counts, and the court of appeals affirmed (Pet. App. A). Kramer's petition for a writ of certiorari (No. 77-5040) was denied on October 3, 1977.



The evidence at trial showed that petitioner, a medical doctor, was the chief executive officer of the Family Health Foundation, a non-profit corporation that provided family planning services in the State of Louisiana. During 1972, the Foundation developed a program to build mobile clinics in order to serve patients of the Louisiana Family Planning Program. The Foundation was reimbursed for its expenses by the State of Louisiana, which in turn received 75 percent to 90 percent reimbursement from the federal government under Title IV-A of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.* Petitioner overcharged the State $4,400 for each of 12 mobile clinics and also billed the State at the inflated price for 15 clinics that were never built. The $4,400 surplus was paid to the building contractor, who passed the money to the Scholarship, Education and Defense Fund for Racial Equality ("SEDFRE"), a New York consulting firm. SEDFRE in turn served as a conduit for channeling the funds to Sherman Copelin, the director of the New Orleans Model Cities Program, who performed no work for the money received (Pet. App. 5a-7a).

The Foundation had an annual $3.5 million contract with the Model Cities Program to staff and maintain neighborhood health clinics. Copelin and his associate, Don Hubbard, asked petitioner for $100,000 as "seed money" from the Foundation to start a consulting firm. Petitioner and his executive assistant, Eugene Wallace, told Copelin that the Foundation did not have $100,000, but that they could put Hubbard on the Foundation's payroll and could give Copelin $50,000 cash. At petitioner's direction, Oscar Kramer, comptroller of the Foundation and director of the Louisiana Family Planning Program, devised the plan of adding to the actual construction costs of the mobile clinics as a way of obtaining

the needed cash. Hubbard obtained the approval of Ronnie Moore, the executive director of SEDFRE, to use SEDFRE as a conduit for funneling the money to Copelin. Kramer instructed the building contractor to divert the additional $4,400 per unit to SEDFRE as payment for a day care center study. After the payments to SEDFRE were discovered by an accounting firm, Kramer, also at the behest of petitioner, wrote a day care study report using SEDFRE'S name and backdated bills from SEDFRE to the construction company, although SEDFRE had never actually undertaken the day care study and procurement of the study was never a part of the contract between the Foundation and the construction company (Pet. App. 7a-9a, nn. 6, 7; Tr. I 116-119, 132-137, 188-190, 206-209; Tr. III 20-27, 109-130; Tr. IV 30, 146, 174-177, 246-252).

## ARGUMENT

Petitioner's claims of error are fully answered by the opinion of the court of appeals and are identical to the contentions presented by co-defendant Kramer in No. 77-5040. The Court denied Kramer's petition for a writ of certiorari on October 3, 1977, and there is no more reason to grant review here.

1. Petitioner's claim that he should have been given a new trial on the basis of newly discovered evidence or government misconduct is not supported by the record.

a. Petitioner contends (Pet. 19-20) that he is entitled to a new trial because he learned after trial that the government allegedly had promised Ronnie Moore, the executive director of SEDFRE, that Moore would not be prosecuted for perjury if he recanted his false grand jury testimony. Prior to trial, however, petitioner received copies of Moore's grand jury testimony and was thus made aware both that Moore had recanted and of the



reasons for the recantation. Moreover, Moore expressly testified on cross-examination at petitioner's trial that, after his attorney had spoken to the government prosecutor, he decided to change his testimony to avoid a perjury prosecution. This decision, Moore testified, stemmed from the fact that his attorney had advised him that, if he testified truthfully, he would be exonerated for the statements made during his first two grand jury appearances, but that, if he lied a third time, he could be prosecuted for perjury (Tr. XVI 198-205). This advice was consistent with the law permitting recantation of false declarations before a grand jury. See 18 U.S.C. 1623(d). In these circumstances, both courts below correctly concluded that there was no secret "deal" between Moore and the government (Pet. App. 12a). This fact finding does not merit further review.[2]

b. Petitioner further contends (Pet. 20-22) that the government violated *Brady* v. *Maryland*, 373 U.S. 83, by failing to disclose that Copelin and Hubbard had made pre-trial statements to the prosecutors that tended to exculpate him. Specifically, petitioner relies upon post-trial testimony by Assistant United States Attorney James Carriere that Copelin and Hubbard were not called as government witnesses against petitioner because their statements were inconsistent to some extent with those of Moore and Wallace. Since petitioner made no request for any such statements, "the prosecutor will

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[2]Petitioner also contends (Pet. 19) that the district court should not have instructed the jury that Moore had a right voluntarily to recant his testimony (Tr. XVI 234-235). This charge, however, was a correct statement of the law under 18 U.S.C. 1623(d). Moore's decision to testify in order to bar prosecution for making false declarations before the grand jury did not render his testimony involuntary.

not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of [petitioner's] right to a fair trial." *United States* v. *Agurs*, 427 U.S. 97, 108. To be material, "the omitted evidence [must create] a reasonable doubt that did not otherwise exist" (*id.* at 112), and "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-110. Even assuming that the undisclosed evidence in this case was actually unknown to petitioner,[3] the evidence was not material under this standard.

Before the grand jury, Copelin had testified not about the mobile clinic payments that were the subject of petitioner's indictment but rather about other payments to him by petitioner while he was the director of the New Orleans Model Cities Program. The government planned to use Copelin as a witness at trial only if petitioner took

[3]Contrary to petitioner's assertion that he was deceived as to the substance of Copelin's story, petitioner or his attorney had met with Copelin and Hubbard prior to trial to discuss petitioner's case. Petitioner's attorney also was informed by Copelin's attorney of what Copelin's testimony would be and agreed that it would be harmful to petitioner (S. Tr. 638-639). ("S. Tr." refers to the transcript of the Louisiana state court hearing on motions by Hubbard and Copelin to quash their state indictment for involvement in the Family Health Foundation matter. This transcript was introduced as Government Exhibit 1 at the hearing on petitioner's new trial motion.) Furthermore, before trial petitioner was given a copy of Copelin's federal grand jury testimony and obtained a copy of the handwritten notes of the prosecutor's interview with Copelin (S. Tr. 623-624). Petitioner therefore was aware of the details of Copelin's statements to the government, and it was for this reason that Carriere did not turn over a summary of his interview with Copelin (H. Tr. 16-18, 25). ("H. Tr." refers to the transcript of the hearing on petitioner's motion for a new trial.)



the stand, to impeach his credibility with these payments. Moreover, in his office interview with Carriere, Copelin admitted that he had done no work for the money received from SEDFRE (S. Tr. 186-192, 216, 220-222). Although Copelin also denied that he initially had been aware of the source of the money, this testimony did not tend to exculpate petitioner: Copelin did not dispute that petitioner was the source of the illegal payments; Copelin simply contended that he personally had no guilty knowledge of that fact at the outset of the scheme. By the same token, Copelin's claim of innocence did not rebut the testimony of either Moore or Wallace that petitioner had authorized the overcharges for construction costs as a method of obtaining funds to channel to Copelin (Tr. XV 99-110; Tr. XIV 174-198). Thus, even assuming (contrary to the district court's express finding; see Pet. App. 48a) that petitioner was unaware that Copelin had denied his own culpability in his discussions with the government, which is exceedingly unlikely in view of his pre-trial meetings with Copelin, this evidence would not have created "a reasonable doubt [about petitioner's guilt] that did not otherwise exist." *United States* v. *Agurs*, *supra*, 427 U.S. at 112.

The government did provide petitioner with a summary of Hubbard's expected testimony. Essentially, Hubbard admitted that he arranged the contract between the construction company and SEDFRE on behalf of the Foundation and that he participated in the cover-up by assisting Kramer in procuring supplies from SEDFRE for use in fabricating the day care center report. Like Copelin, however, Hubbard denied that he knew from the beginning that SEDFRE was to serve merely as a conduit (S. Tr. 190-194, 210-213, 216, 222-223). The government chose not to use Hubbard as a witness, although he would have corroborated much of its evidence, because

parts of his story would have contradicted Moore's statement that Hubbard had maintained from the inception of the plan that SEDFRE was to serve as a conduit. Hubbard claimed that he did not learn this until later, when Kramer told him that the SEDFRE arrangement was a sham and recruited his assistance in the cover-up (S. Tr. 210-213, 226, 228-230). Again, even assuming *arguendo* that petitioner actually was unaware that Hubbard personally denied guilty knowledge, the value of this information to his defense was minimal. Indeed, whatever benefit petitioner could have derived from Hubbard's own claim of innocence would have been substantially outweighed by Hubbard's corrobation of the incriminating testimony of other government witnesses.[4] At no time did Hubbard tell the prosecutors that *petitioner* was unaware that the overcharge of $4,400 per mobile clinic would eventually end up in Copelin's hands.

In sum, the trial judge, who was most familiar with the evidence against petitioner, found after a hearing that the statements of Copelin and Hubbard had not been improperly withheld from petitioner, that these statements would not have tended to exonerate petitioner, and that none of the allegedly newly discovered evidence suggested that petitioner "had aught but a fair trial" (Pet. App. 47a, 53a). We submit that the district court's "firsthand appraisal of the record was thorough and entirely reasonable" (*United States* v. *Agurs, supra*, 427 U.S. at 114) and should not be disturbed.

2. Petitioner complains (Pet. 24-26) that the government misused the grand jury process by permitting Moore to testify before the grand jury subsequent to

[4]It is presumably for this reason that petitioner declined the trial judge's invitation to call Hubbard or Copelin as a court witness (Pet. App. 13a).



petitioner's indictment. As petitioner concedes (Pet. 24), however, the court of appeals acknowledged the prevailing rule that "prosecutorial agents may not use the Grand Jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery" (Pet. App. 10a-11a), but found (as had the district court) that the government's primary purpose in allowing Moore to testify was not improper (*id.* at 11a-12a; H. Tr. 29-31). This finding was correct. Under 18 U.S.C. 1623(d), it was entirely legitimate to afford Moore the opportunity to reappear before the grand jury to recant the false declarations he had made in his two previous grand jury appearances, in order to avoid a perjury prosecution. In any event, even if there were merit to petitioner's allegation that the grand jury should not have heard Moore's testimony, he offers no reason to believe that that testimony led to the discovery of any new evidence or otherwise tainted his trial. See *United States* v. *Braasch*, 505 F. 2d 139, 147 (C.A. 7), certiorari denied, 421 U.S. 910.

3. Petitioner's final claim (Pet. 22-24) is that the government should have granted immunity to Copelin and Hubbard to force them to testify at the hearing on his motion for a new trial.[5] Nothing in the record suggests that the testimony of Copelin and Hubbard at the post-trial hearing would have been helpful to petitioner or would have added to the facts already known. As noted above, petitioner declined the court's offer to call Copelin and Hubbard as witnesses at trial, and petitioner's attorney

[5]At the evidentiary hearing, Copelin and Hubbard stated that they would plead the Fifth Amendment if called to testify (H. Tr. 10). Copelin's prior grant of immunity did not concern the illegal payments related to the mobile clinics, while Hubbard's prior grant of immunity had never been accompanied by a court order pursuant to 18 U.S.C. 6003 (S. Tr. 189).

expressly admitted in the state court hearing that Copelin's testimony would have been very damaging to petitioner. Moreover, not only were Copelin's and Hubbard's claims that they did not know that SEDFRE was a mere conduit not exculpatory of petitioner, but also Assistant United States Attorney Carriere admitted at the state court hearing that those witnesses had denied their guilty knowledge of SEDFRE's true role in their discussions with the government. Since the state court transcript was introduced as an exhibit at the evidentiary hearing on petitioner's motion for a new trial, and since the key facts underlying petitioner's claims were essentially uncontroverted, it is far from apparent that petitioner would have gained anything by a grant of immunity to Copelin and Hubbard.

In any event, under 18 U.S.C. 6003(b), the decision to request immunity for a witness—with its consequent impairment of the government's ability to prosecute—rests within the discretion of the United States Attorney, "when in his judgment" the testimony "may be necessary to the public interest." As the courts have uniformly ruled, the government cannot be compelled to grant immunity to prospective defense witnesses. See, *e.g.*, *United States* v. *Graham*, 548 F. 2d 1302, 1315 (C.A. 8); *United States* v. *Alessio*, 528 F. 2d 1079, 1081 (C.A. 9), certiorari denied, 426 U.S. 948; *United States* v. *Allstate Mortgage Corporation*, 507 F. 2d 492, 494-495 (C.A. 7), certiorari denied, 421 U.S. 999; *In re Kilgo*, 484 F. 2d 1215, 1222 (C.A. 4).[6]

[6] *Earl* v. *United States*, 361 F. 2d 531 (C.A.D.C.), certiorari denied, 388 U.S. 921, on which petitioner relies, does not support his position. In *Earl*, the court held that the judiciary was powerless to change legislation that gave the benefit of an immunity statute only to the government and that any change in the immunity law must come from Congress (*id.* at 534). Although the court remarked that one could argue that when the government grants immunity to its witnesses at trial, the defense should have the same privilege (*id.* at 534, n. 1), that hypothetical situation was not presented in this case.



Petitioner's position, which would require the immunization of persons who may have committed a criminal offense merely upon the representation that the witness would testify on behalf of the accused, would infringe substantially upon the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693. Particularly in the circumstances of this case, where petitioner sought immunity to force Copelin and Hubbard to testify at a post-trial hearing rather than at trial and made no showing that the testimony of those witnesses was crucial to his claims, the refusal to grant immunity did not deny petitioner a fair trial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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